
VI. PROCEDURAL MATTERS**A. Regulatory Flexibility Act**

35. The Final Regulatory Flexibility Act pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix C.

B. Paperwork Reduction Act

36. This Report and Order contains no new or modified information collection requirements. The information collections referenced in the item are contained in information collections previously approved by the Office of Management and Budget under the Paperwork Reduction Act.

C. Ordering Clauses

37. Accordingly, IT IS ORDERED THAT, pursuant to the authority of Sections 4(i), 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a), section 90.709 of the Commission's Rules, 47 C.F.R. § 90.709, IS AMENDED as set forth in Appendix B.

38. IT IS FURTHER ORDERED THAT, pursuant to the authority of Sections 4(i), 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a), section 90.725 of the Commission's Rules, 47 C.F.R. § 90.725, IS AMENDED as set forth in Appendix B.

39. IT IS FURTHER ORDERED THAT, pursuant to the authority of Sections 4(i), 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a), section 90.1019 of the Commission's Rules, 47 C.F.R. § 90.1019, IS AMENDED as set forth in Appendix B.

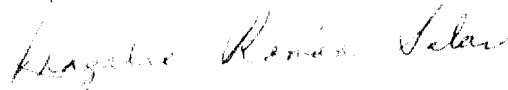
40. IT IS FURTHER ORDERED THAT the rule change adopted herein SHALL BECOME EFFECTIVE sixty days after date of publication in the Federal Register. This action is taken pursuant to sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

41. IT IS FURTHER ORDERED THAT the Director, Office of Public Affairs, SHALL SEND a copy of this *Fifth Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. § 601(a).

D. Further Information

42. For further information concerning this proceeding, contact Scott A. Mackoul, Federal Communications Commission, Wireless Telecommunications Bureau, Commercial Wireless Division, Policy and Rules Branch, at (202) 418-7240.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

APPENDIX A

LIST OF COMMENTERS

Comments

American Mobile Telecommunications Association, Inc. (AMTA)

ComTech Communications, Inc. (ComTech)

Global Cellular Communications, Inc. (Global)

Intek Diversified Corp. (Intek)

Rush Network Corp. (Rush)

SMR Advisory Group, L.C. (SMR Group)

Reply Comments

ComTech Communications, Inc. (ComTech)

Intek Diversified Corp. (Intek)

APPENDIX B**FINAL RULES**

Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 90.709 is revised as follows:

Sec. 90.709 Special limitations on amendment of applications and on assignment or transfer of authorizations licensed under this subpart.

* * * *

(d) A licensee may partially assign any authorization in accordance with § 90.1019.

* * * *

2. Section 90.725 is revised as follows:

Sec. 90.725 Construction requirements for Phase I licensees.

(a) Licensees granted commercial nationwide authorizations will be required to construct base stations and placed those base stations in operation as follows:

* * * *

3. The Table of Contents for Subpart W of Part 90 is revised as follows:

Subpart W -- Competitive Bidding Procedures for the 220 MHz Service

* * * *

90.1019 Partitioning and disaggregation.

* * * *

4. Section 90.1019 is revised as follows:

Sec. 90.1019 Partitioning and disaggregation.

(a) *Definitions.*

Disaggregation. The assignment of discrete portions or "blocks" of spectrum licensed to a geographic licensee or qualifying entity.

Partitioning. The assignment of geographic portions of a licensee's authorized service area along geopolitical or other geographic boundaries.

(b) *Eligibility.*

(1) Phase I non-nationwide licensees may apply to partition their licensed geographic service area or disaggregate their licensed spectrum after constructing their systems and placing their in operation or commencing service in accordance with the provisions in § 90.725(f).

(2) Phase I nationwide licensees may apply to partition their licensed geographic service area or disaggregate their licensed spectrum after constructing at least 40 percent of the geographic areas designated in their applications in accordance with the provisions in § 90.725(a).

(3) Phase II licensees may apply to partition their licensed geographic service area or disaggregate their licensed spectrum at any time following the grant of their licenses.

(4) Phase I and Phase II licensees authorized to operate on Channels 161 through 170 or Channels 181 through 185 are not eligible to partition their geographic service area or disaggregate their licensed spectrum.

(5) Parties seeking approval for partitioning and disaggregation shall request authorization for partial assignment of a license pursuant to § 90.709, as amended.

(c) *Technical Standards.*

(1) *Partitioning.* In the case of partitioning, requests for authorization for partial assignment of a license must include, as an attachment, a description of the partitioned service area. The partitioned service area shall be defined by coordinate points at every 3 degrees along the partitioned service area agreed to by both parties, unless either an FCC-recognized service area is utilized (*i.e.*, Major Trading Area, Basic Trading Area, Metropolitan Service Area, Rural Service or Economic Area) or county lines are followed. The geographical coordinates must be specified in degrees, minutes and seconds to the nearest second latitude and longitude, and must be based upon the 1983 North American Datum (NAD83). In the case where an FCC-recognized service area or county lines are utilized, applicants need only list the specific area(s) through use of FCC designations or county names that constitute the partitioned area. In such partitioning cases where an unjust enrichment payment is owed the Commission, the request for authorization for partial assignment of a license must include, as an attachment, a calculation of the population of the partitioned service area and licensed geographic service area.

(2) *Disaggregation.* Spectrum may be disaggregated in any amount.

(3) *Combined Partitioning and Disaggregation.* The Commission will consider requests for partial assignment of licenses that propose combinations of partitioning and disaggregation. In the event that there is a conflict in the application of the partitioning and disaggregation rules, the partitioning rules take precedence.

(d) *License Term.* The license term for a partitioned license area and for disaggregated spectrum shall be the remainder of the original licensee's license term.

(e) *Construction Requirements.*

(1) *Requirements for Partitioning.* Phase II EA, Regional or nationwide licensees seeking authority to partition must meet one of the following construction requirements:

(A) The partitionee may certify that it will satisfy the applicable construction requirements set forth in Secs. 90.767 or 90.769, as applicable, for the partitioned license area; or

(B) The original licensee may certify that it has or will meet its five-year construction requirement and will meet the ten-year construction requirement, as set forth in Secs. 90.767 or 90.769, as applicable, for the entire license area. In that case, the partitionee must only satisfy the requirements for "substantial service," as set forth in Sec. 90.743(a)(1), for the partitioned license area by the end of the original ten-year license term of the licensee.

(C) Applications requesting partial assignments of license for partitioning must include a certification by each party as to which of the above construction options they select.

(D) Partitionees must submit supporting documents showing compliance with the respective construction requirements within the appropriate five-year and ten-year construction benchmarks set forth in Sec. 90.767 or 90.769, as applicable.

(E) Failure by any partitionee to meet its respective construction requirements will result in the automatic cancellation of the partitioned license without further Commission action.

(2) *Requirements for Disaggregation.* Parties seeking authority to disaggregate spectrum from a Phase II EA, Regional or nationwide license, must submit with their partial assignment application a certification signed by both parties stating which of the parties will be responsible for meeting the five-year and ten-year construction requirements for the particular market as set forth in Sec. 90.767 or 90.769, as applicable. Parties may agree to share responsibility for meeting the construction requirements. If one party accepts responsibility for meeting the construction requirements and later fails to do so, then its license will cancel automatically without further Commission action. If both parties accept responsibility for meeting the construction requirements and later fail to do so, then both their licenses will cancel automatically without further Commission action.

APPENDIX C**FINAL REGULATORY FLEXIBILITY ANALYSIS***Fifth Report and Order*

As required by section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Third Report & Order; Fifth Notice of Proposed Rulemaking (Fifth NPRM)* in PR Docket No. 89-552, RM-8506. The Commission sought written public comment on the proposals in the *Fifth NPRM*, including the IRFA. The Commission's Final Regulatory Flexibility Analysis in this *Fifth Report and Order (Fifth R&O)* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996.¹⁶⁵

A. Need for and Purpose of this Action:

In the *Fifth R&O*, the Commission modifies the 220-222 MHz band service (220 MHz) rules to permit partitioning and disaggregation for all 220 MHz licensees. With more open partitioning and disaggregation, additional entities, including small businesses, may participate in the provision of the 220 MHz service without needing to acquire wholesale an existing license (with all of the rights currently associated with the existing license). Acquiring "less" than the current license will presumably be a more flexible and less expensive alternative for entities desiring to enter these services.

B. Summary of Issues Raised in Response to the Initial Regulatory Flexibility Analysis:

None of the commenters submitted comments that were specifically in response to the IRFA.

C. Description and Number of Small Entities Involved

The rules adopted in the *Fifth R&O* will affect all small businesses which avail themselves of these rule changes, including small businesses that will obtain 220 MHz licenses through auction and subsequently decide to partition or disaggregate, and small businesses who may acquire licenses through partitioning and/or disaggregation.

D. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements:

The rules adopted in the *Fifth R&O* will impose reporting and recordkeeping requirements on small businesses seeking licenses through partitioning and disaggregation. The information requirements will be used to determine whether the licensee is a qualifying entity to obtain a partitioned license or disaggregated spectrum. This information will be given in a one-time filing by any applicant requesting such a license. The information will be submitted on the FCC Form 430 which is currently in use and has already received Office of Management and Budget clearance. The Commission estimates that the average burden on the applicant is three hours for the information

¹⁶⁵ Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAA, Subtitle II of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) *codified at* 5 U.S.C. § 601 *et seq.*)

necessary to complete these forms. The Commission estimates that 75 percent of the respondents (which may include small businesses) will contract out the burden of responding. The Commission estimates that it will take approximately 30 minutes to coordinate information with those contractors. The remaining 25 percent of respondents (which may include small businesses) are estimated to employ in-house staff to provide the information.

E. Steps Taken to Minimize Burdens on Small Entities:

The rules adopted in the *Fifth R&O* are designed to implement Congress' goal of giving small businesses, as well as other entities, the opportunity to participate in the provision of spectrum-based services and are consistent with the Communications Act's mandate to identify and eliminate market entry barriers for entrepreneurs and small businesses in the provision and ownership of telecommunications services.

Allowing non-restricted partitioning and disaggregation will facilitate market entry by parties who may lack the financial resources for participation in auctions, including small businesses. Some small businesses may have been unable to obtain 220 MHz licenses through auction due to high bidding. By allowing open partitioning and disaggregation, small businesses will be able to obtain licenses for smaller service areas and smaller amounts of spectrum at presumably reduced costs, thereby providing a method for small businesses to enter the 220 MHz service marketplace.

Allowing geographic partitioning of 220 MHz licenses by areas defined by the parties will provide an opportunity for small businesses to obtain partitioned 220 MHz license areas designed to serve smaller, niche markets. This will permit small businesses to enter the 220 MHz service marketplace by reducing the overall cost of acquiring a partitioned 220 MHz license.

Allowing disaggregation of spectrum in any amount will also promote participation by small businesses who may seek to acquire a smaller amount of 220 MHz spectrum tailored to meet the needs of their proposed service.

F. Significant Alternatives Considered and Rejected:

The Commission considered and rejected the following alternative proposals concerning 220 MHz partitioning and disaggregation.

The Commission tentatively concluded in the *Fifth NPRM* to not adopt partitioning for non-nationwide Phase I licensees and non-covered Phase II licensees because their licenses were awarded on a site-specific basis rather than for a geographic area. However, the Commission rejected this proposal because it found no compelling reason to withhold from site-specific licensees the flexibility gained by having the option to partition their license. The Commission noted that a number of non-nationwide Phase I licensees have acquired several site-specific licenses and that such consolidation is more likely since the prohibition of a Phase I licensee operating more than one 220 MHz station within a 40-mile geographic area has been eliminated. Both of these developments have created contiguous, compatible and interconnected 220 MHz systems from non-nationwide Phase I licenses. Therefore, the Commission concluded that non-nationwide Phase I licensees should be allowed the same opportunity to partition their systems and will allow that the marketplace to determine if

partitioning is economically or technically feasible for those systems. The Commission did, however, maintain that non-covered Phase II licensees, as well as those Phase I licensees that are Public Safety or EMRS entities, do not need partitioning or disaggregation, but rather should continue to share their licensed spectrum in accordance with section 90.179 of the Commission's rules.

The Commission declined to create a minimum standard for the amount of spectrum that a 220 MHz licensee can disaggregate. In place of regulation, the Commission found that the marketplace will best determine the amount of disaggregated spectrum that is economically or technically feasible and that any minimum standard would not allow for future technology.

The Commission rejected the proposal of Rush Network Corp. (Rush) that all construction requirements be eliminated and, in their place, allow the market to dictate when construction will occur. Recognizing that the most of the 220 MHz licensees have the incentive to construction, the Commission, nonetheless, reaffirmed that construction requirements play a vital role in encouraging rapid deployment of the 220 MHz system and avoid inefficient use of the spectrum.

Along the same lines, the Commission declined permitting nationwide Phase I licensees to partition or disaggregate before meeting the four-year construction benchmark. Current rules prohibit the transfer or assignment of nationwide Phase I licenses prior to the build out of 40 percent of their system to reduce any potential speculation or trafficking in licenses by persons who have no real interest in constructing systems. The Commission concluded that this rationale should also apply to partial assignments, especially for Phase I licensees which received their licenses by lottery and thus lack the financial incentive to recoup their upfront costs.

The Commission also rejected the proposal by American Mobile Telephone Association (AMTA) to convert the six- and ten-year construction requirements for nationwide Phase I licensees to population-based criteria. The Commission found that AMTA's approach would be unnecessarily confusing and inconsistent because those nationwide Phase I licensees that decided to partition or disaggregate would have one set of requirements, while those that did not would have different requirements. Moreover, the Commission found no public benefit to switching the construction requirement criteria after the licenses had already been granted.

Finally, the Commission rejected the recommendation by Rush to eliminate the public notice requirements in licensing partial assignments. The Commission believed that any delay or extra work created by putting the partial assignment applications on public notice would be outweighed by the benefits of public notice, especially because of the potential interference conflicts that partitioning and disaggregation may create.

G. Report to Congress

The Commission shall include a copy of this Final Regulatory Flexibility Analysis, along with this *Fifth R&O*, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this Final Regulatory Flexibility Analysis will also be published in the Federal Register.